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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ERNST & YOUNG,
a Canadian Partnership of Chartered Accountants,
Petitioner,
v.
THE COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Michigan

BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where a professional partnership of Canadian chartered accountants, not certified to practice accounting in the United States and having no direct contacts with Michigan, reports on the financial statements of a Canadian insurance company in Canada pursuant to Canadian accounting and auditing standards, does the Canadian accounting firm's knowledge that its multinational corporate client does business in the United States and may send the accounting firm's audit opinion into Michigan for review by regulators and/or policyholders satisfy the constitutional minimum contacts standard for personal jurisdiction over the accounting firm by a Michigan court?

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BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

The American Institute of Certified Public Accountants (the "Institute") submits this brief as *amicus curiae*, pursuant to Rule 37.2 of the Rules of this Court, in support of Petitioner Ernst & Young, a Canadian partnership of chartered accountants (hereinafter "E&Y-Canada" or "Petitioner") with the written consent of the parties.[1]

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[1] The letters of consent have been filed with the Clerk of the Court. No counsel for any party to this action authored this brief in whole or in part. No person or entity other than the Institute, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF THE INSTITUTE AS *AMICUS CURIAE*

The Institute is the national organization of the certified public accounting profession, with more than 330,000 members. Institute members in public practice, who range from sole practitioners to members of large international firms, provide a wide range of accounting services to the public. One of the primary objectives of the Institute is the development of authoritative accounting, auditing, and ethical standards of practice. These standards include, for purposes here, those governing the preparation and scope of auditing, tax, and other opinions and reports rendered by accountants.

The issue presented by the Petition transcends the interests of the parties and is of particular importance to the Institute and its members. The Institute submits this brief in support of the Petitioner because the decision below threatens important and legitimate interests of its members and the international business community generally. Consistent with applicable Institute and other standards, accountants around the world routinely issue reports and provide written advice to clients concerning various aspects of corporate transactions. These engagements range from traditional auditing functions to consulting on proposed or hypothetical transactions. Increasingly, accounting firms, as well as other professionals such as lawyers, appraisers, and investment bankers, provide services in connection with multinational transactions and to clients having a presence in more than one jurisdiction or country. This globalization of business, and the apparent breakdown of traditional territorial boundaries, require American courts to be particularly sensitive to the due process interests implicated in the exercise of personal jurisdiction so as to prevent the imposition of excessive burdens of litigation in American courts on entities having little or no contact with this country.

The decision by the Michigan Court of Appeals, which essentially imputes the Michigan contacts of a client to its

nonresident accountant for jurisdictional purposes, threatens the ability of accounting firms and other professionals to provide necessary services to their clients because it exposes such professional advisors to liability in whatever jurisdiction their clients choose to do business. The specific concerns raised by the decision below, which conflicts with existing jurisprudence of this Court and represents one side of a split among the federal circuit courts of appeals, are the following:

First, a rule of law that a professional advisor is subject to the personal jurisdiction of, and the burden of litigating in, any American court where it may be aware that its client may have a presence or use the services provided by the advisor, inappropriately creates a lower and more burdensome standard for nonresident professionals providing information services than for foreign manufacturers of products.

Second, such a rule of law will harm United States and international commerce because it may substantially increase the costs and uncertainties of providing professional information services which, in turn, may make it more difficult for multinational corporations doing business in the United States to find cost-effective professional services for their international operations.

Third, such a rule may encourage other nations to exercise comparable and exorbitant jurisdiction over American accountants and other professionals who have no greater ties or relations with those foreign jurisdictions than E&Y-Canada has with Michigan.

Finally, the rule of law could well lead to a conflict between the governments and laws of Canada (and other countries) and the United States, to the detriment of trade between those nations.

In order to avoid unnecessary duplication, the Institute defers to the Petitioner's recitation of the Statement of the Case.

THE DECISION BELOW

The Michigan Court of Appeals, by a 2-to-1 majority, held that, notwithstanding E&Y-Canada's absence of direct contacts with Michigan, E&Y-Canada had purposefully established minimum contacts with Michigan sufficient to justify the exercise of personal jurisdiction in Michigan under Michigan's long-arm statute. M.C.L. § 600.725(2); M.S.A. § 27A.725(2) (long-arm jurisdiction predicated upon "[t]he doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort"). The court concluded that such a finding was appropriate because: (1) E&Y-Canada had rendered professional accounting services to a multinational company which, although a Canadian insurer, was also deemed under a Michigan legal fiction to be a Michigan domiciliary; and (2) E&Y-Canada could have foreseen that the annual reports of Confederation Life Insurance Company ("CLIC"), including E&Y-Canada's audit opinions, would be sent by CLIC into Michigan as part of CLIC's regulatory filings and would be relied upon by Michigan regulators and policyholders. *Commissioner of Ins. v. Albino*, 572 N.W.2d 21, 28 (Mich. Ct. App. 1997) (Pet. App. at C-16).

The dissenting judge (Jansen, J.) rejected the majority's reasoning, finding that E&Y-Canada did not have "minimum" contacts with Michigan sufficient to assert personal jurisdiction. Judge Jansen specifically stated that "[t]he unilateral acts of unrelated third parties may not be used to justify the imposition of personal jurisdiction" and that "the question regarding the foreseeability of defendant's audits being relied upon in Michigan is not sufficient to create the proper exercise of limited personal jurisdiction." *Id.* at 32 (Pet. App. at C-26). Judge Jansen also highlighted the tenuous links of CLIC itself with the Michigan forum: "Michigan is merely CLIC's state of entry into the United States, but this does not make even CLIC a Michigan resident." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE ISSUE PRESENTED IS OF GREAT IMPORTANCE TO ACCOUNTING FIRMS AND OTHER PROFESSIONALS PROVIDING INFORMATION SERVICES TO MULTINATIONAL CORPORATIONS.

Accountants render valuable professional services in a wide range of commercial transactions. In addition to traditional auditing, tax, and accounting services, accountants advise and report on numerous financial matters. Through these professional engagements, accountants play a valuable role in evaluating and reporting complex financial data on behalf of their clients and the marketplace. These services are vital to the growth and competitive viability of our economy. *See Sharp v. Coopers & Lybrand*, 649 F.2d 175, 184 (CA3 1981) (recognizing important services performed by accountants), *cert. denied*, 455 U.S. 938 (1982). However, accountants are often drawn into litigation as additional "deep pocket" defendants in fora of whose benefits they have not purposefully availed themselves. *See, e.g., Young v. FDIC*, 103 F.3d 1180 (CA4), *cert. denied*, 118 S. Ct. 329 (1997); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (CA2 1972); *United Bank of Kuwait, PLC v. James M. Bridges, Ltd.*, 766 F. Supp. 113 (S.D.N.Y. 1991); *Morley v. Cohen*, 610 F. Supp. 798 (D. Md. 1985); *In re Chambers Dev. Co. Shareholders Litig.*, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,637 (Del. Ch. May 20, 1993); *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630 (Tex. App. 1993, *writ denied*).

As the economy shifts from sales of goods to transactions in information services and the economy becomes increasingly global in nature, American courts must be extra vigilant not to expose foreign professionals to jurisdiction in such courts where assumption of jurisdiction would violate the Due Process Clause. The decision of the Michigan Court of Appeals will subject accountants,

and other professionals providing information services, to suit anywhere their clients choose to do business, irrespective of appropriate measures that the professionals have taken to limit their jurisdictional exposure.

Unlike manufacturers of goods, professionals—such as accountants, lawyers, and appraisers—sell services. Such professionals are governed by laws, regulations, and rules that limit the geographic scope of their practice. Here, E&Y-Canada was restricted by Canadian professional rules to practice accounting only in Canada. E&Y-Canada is not certified by Michigan to practice public accounting in Michigan. Indeed, Canada has its own set of licensing and auditing standards that differ from the standards applicable to certified public accountants in the United States. Clients of such professionals are neither bound nor limited by such rules and may choose to do business in the United States, regardless of the efforts of their professional advisors to structure their own businesses to remain exclusively within one locale or jurisdiction.

Under the reasoning of the Michigan Court of Appeals, a unilateral decision by a client to do business in the United States threatens automatically to expose its accountants, and other professionals providing information services to such a client, to jurisdiction (and, possibly, legal liability) in federal and state courts here. If the reasoning of the court below and the courts that have adopted similar reasoning (*see* Pet. at 16-22) stands uncorrected, it may have important and far-reaching consequences for accountants and other professionals that provide financial and other services to clients having a multinational presence. Indeed, the reasoning of the court below may trigger the application of similar over-expansive jurisdictional standards by foreign courts to American professionals providing services to corporations having a presence in those foreign jurisdictions.

II. THE COURT SHOULD REVIEW THE DECISION BELOW AND ESTABLISH A MEANINGFUL AND UNIFORM STANDARD FOR THE EXERCISE OF PERSONAL JURISDICTION OVER PROFESSIONALS PROVIDING INFORMATION SERVICES.

A. The "Foreseeability" Standard Established by the Court Below for Asserting Personal Jurisdiction Over a Foreign Professional Providing Information Services Is Lower Than the Standard Established by This Court for Asserting Personal Jurisdiction Over a Foreign Manufacturer of Goods.

Although this Court has never addressed the limits of the Due Process Clause in the precise circumstances presented by this case, two guiding and related principles have emerged from this Court's jurisprudence. Both are particularly pertinent here, and both were ignored by the Michigan Court of Appeals.

First, this Court has held, in the context of a foreign manufacturer of products, that foreseeability that a product may cause injury within a state is not a "sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (White, J.). Instead, the "foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

Second, this Court has held that any jurisdictionally relevant contacts must be those of the defendant over whom jurisdiction is to be asserted rather than contacts of any third party. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("[A] defendant will not be haled into a jurisdiction solely as a result of . . . the 'unilateral activity of another party or a third person.' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.") (emphasis in

original) (citations omitted); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[The] unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

Here, CLIC unilaterally used E&Y-Canada's audit opinion and transmitted it to the Michigan Commissioner of Insurance. E&Y-Canada had no control whatsoever over CLIC's decision to transmit the results of Canadian accounting services provided under Canadian accounting rules in Canada into the Michigan forum. The fact that E&Y-Canada could have foreseen that its client might engage in such conduct is simply insufficient to confer personal jurisdiction over E&Y-Canada under the standards developed by this Court in the context of foreign product manufacturers who place products into the "stream of commerce." In that context, this Court has cautioned that "the mere likelihood that a product will find its way into the forum State" is not sufficient to exercise jurisdiction over the manufacturer of the products under due process principles. *World-Wide Volkswagen*, 444 U.S. at 297. *See also Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.") (plurality opinion); *Gould v. P.T. Krakatau Steel*, 957 F.2d 573, 576 (CA8) ("Standing alone, the fact that Krakatau could foresee that its product might find its way to Arkansas is too attenuated to constitute purposeful availment of Arkansas' laws and protections."), *cert. denied*, 506 U.S. 908 (1992).

By creating a mere "foreseeability" standard, the decision below establishes a *lower* standard for the assertion of personal jurisdiction over foreign professionals providing information services than for foreign manufacturers

of products. This different and lower standard is burdensome, unfair, and singularly inappropriate. There is a crucial difference between a manufacturer of goods and a provider of services—a distinction that is reflected in judicial decisions that have refused to expand liability of accountants to all persons who may foreseeably rely on accountants' opinions. That distinction, however, warrants a *higher*, not lower, standard for personal jurisdiction under the Due Process Clause.

The crucial distinction is this: A foreign manufacturer exercises far greater control over the distribution of its product than can a professional rendering information services. A manufacturer can control the number of products that it manufactures and the entities to which it will ship those goods. The manufacturer is thus able to limit its potential liability to third persons and can factor the risks and burdens of potential American litigation into the price of its product.

By contrast, professionals providing information services outside the United States do not have the same ability to limit their exposure. Once a professional renders intangible information services to its client, the professional loses all meaningful control over the client's distribution and use of that information. Courts have recognized this important distinction between "information" and "products" in establishing the proper standard of negligence liability for reports prepared by accountants. *See, e.g., Bily v. Arthur Young & Co.*, 834 P.2d 745, 762-63 (Cal. 1992) (rejecting argument that accountants should be liable to all persons who foreseeably rely on accountants' professional opinions). Similarly, in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), then-Chief Judge Cardozo for this very reason refused to apply to public accountants the same rules of liability that he had applied to manufacturers of dangerous products in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). *See*

Ultramares, 174 N.E. at 445 (refusing to attach a "like liability . . . to the circulation of a thought or a release of the explosive power resident in words").

Thus, unlike a foreign manufacturer sending goods into the United States, a professional providing information services outside the United States to a multinational client lacks any effective means of controlling that client's subsequent distribution of the information in this country. The professional in such circumstances cannot be said to "purposefully avail" itself of the American forum where its client uses the information.

The Court should grant the petition for certiorari to review the decision of the court below and establish a standard for personal jurisdiction reflecting the fact that professional providers of information services lack control over the distribution of their "products" and should not be found to have "purposefully availed" themselves of a forum simply because their clients may foreseeably do business there. Such a standard should be higher than, or at the very least the same as, the standard that this Court has applied to manufacturers of products.

B. The Decision Below Will Increase the Cost and Uncertainty of Providing Necessary Information Services to Multinational Corporations Having a Presence in the United States.

A rule that a professional providing information services is subject to personal jurisdiction wherever its client may foreseeably do business or use its services will substantially increase the cost and uncertainty of providing such services. The decision below will inflict real economic burdens on accountants and other professionals outside the United States. Such professionals will not be able to plan with any certainty where they might be subject to suit because the situs of any potential legal action will be left to the discretion of a client who may or may not do

business in any of the fifty states. Consequently, corporations doing business in the United States may find it difficult to obtain cost-effective professional services for their international operations. These undesirable effects are clearly harmful to both United States and international commerce.

C. The Rule of Law Established by the Court Below May Lead to Conflicts With Foreign Courts and Undesirable Results for American Professionals Providing Services to Foreign Corporations.

If the reasoning of the Michigan Court of Appeals is adopted by other states it will create an additional and serious risk that foreign jurisdictions may reciprocally apply similar aggressive jurisdictional standards to accountants and other professionals providing services *in the United States* to foreign corporations doing business here. If a foreign court applied such a "foreseeability" jurisdictional standard, it is unclear whether an American court would enforce a judgment procured under such circumstances. *See, e.g.*, Uniform Foreign Money-Judgments Recognition Act § 4(a)(2) (1986 & Supp. 1997) (including lack of personal jurisdiction over defendant among grounds for non-recognition of foreign judgment). Subjecting accountants and other professionals practicing in the United States to litigation in far-flung jurisdictions simply because their clients choose to do business in those places is a dangerous byproduct of the decision below.

Although the court below addressed the "reasonableness" of exercising long-arm jurisdiction over E&Y-Canada under due process principles, it summarily ignored the potential harmful effect that its "foreseeability" rule might have on relations between it and the Canadian courts. Respondent himself is pursuing claims in Ontario against CTSL, a CLIC subsidiary, and CLIC's total company liquidation is proceeding in Ontario. Yet, the court below never even considered that Ontario might have an interest

in the standards that should apply to an Ontario-based accountant that provided accounting services in Canada under Canadian accounting rules to its Canadian client. Indeed, the court below was wholly impervious to the dangers of extraterritorially applying Michigan law to Canadian accountants for Canadian conduct governed by Canadian law. *See Asahi*, 480 U.S. at 115 (" 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' ") (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

In extreme circumstances, rulings by American courts that have encroached upon the judicial authority of other nations have resulted in regrettable retaliatory measures by those nations. *See, e.g.*, Gary B. Born, *International Civil Litigation in United States Courts* 850-52 (3d ed. 1996) (observing that "some 15 foreign states have taken more vigorous steps to thwart U.S. discovery" and "most foreign nondisclosure statutes are comparatively recent enactments that were precipitated by unilateral U.S. extraterritorial discovery"). A rule of law that professionals outside the United States are subject to the jurisdiction of American courts in any state where their clients may foreseeably do business is the type of sweeping extraterritorial pronouncement that may have serious repercussions in foreign courts and legislatures.

D. This Case Presents an Appropriate Context for This Court to Address the Important Question Raised by the Petition.

The 2-to-1 decision of the court below presents a perfect opportunity to resolve the important and clear question of whether a professional's knowledge that its client may transmit information provided by the professional into an American forum is sufficient to exercise *in personam* jurisdiction over the professional. The majority concluded that foreseeability was enough, whereas the

dissent believed that "the question regarding the foreseeability of defendant's audits being relied upon in Michigan is not sufficient to create the proper exercise of limited personal jurisdiction." *Commissioner of Ins.*, 572 N.W.2d at 32 (Pet. App. at C-26 to C-27). Indeed, this narrow issue has caused a split of authority in the federal circuit courts of appeals. The Institute will not repeat the Petitioner's detailed treatment of this subject (Pet. at 16-22), with which it concurs. Suffice it to say that the question presented by the Petition has caused substantial confusion in both state courts and lower federal courts leading to jurisdictional outcomes governed by the fortuity of the fora in which cases are brought. The question is of such importance to accountants, appraisers, architects, lawyers, and other professionals providing information or advice to multinational clients, and the dissonance in the lower courts is so severe that review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the American Institute of Certified Public Accountants respectfully requests that the Court grant a writ of certiorari to review the decision of the Court of Appeals of the State of Michigan.

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